

DOCUMENT RESUME

ED 243 227

EA 016 723

AUTHOR O'Reilly, Robert C.
TITLE Aspects of Liability in the Operation of Schools.
PUB DATE 31 Mar 84
NOTE 17p.; Paper presented at the Annual Meeting of the National School Boards Association (Houston, TX, March 31-April 3, 1984).
PUB TYPE Viewpoints (120) -- Speeches/Conference Papers (150) -- Legal/Legislative/Regulatory Materials (090)
EDRS PRICE MF01/PC01 Plus Postage.
DESCRIPTORS *Court Litigation; Federal Courts; *Legal Responsibility; National Surveys; Public Schools; Questionnaires; School Accidents; *School Districts; *School Personnel; *School Safety; State Courts; State Legislation; State Surveys; *Torts
IDENTIFIERS *Nebraska

ABSTRACT

Parents generally expect public school districts to provide for their children's care and safety while they are at school. Although in the first half of the twentieth century common law tended to make school officials immune from suit, more recently public school districts, school employees, officers, and elected boards have been successfully sued for damages. A review of representative court cases in Nebraska and other states reveals a tendency toward increasingly higher damage awards in suits against school districts and their governing boards. In contrast to Oregon's 1967 statutory repeal of governmental immunity, which sets a limit on damage awards, Nebraska's 1969 statute has no specific dollar limits. In the 1980's, public school boards should provide protection for themselves and for the district treasury. Surveys by the Insurance Information Institute and "Risk Line" and responses to a questionnaire sent to 34 Nebraska school business managers show that, although awards and insurance rates are becoming higher nationally, Nebraska school districts tend to have relatively low liability limits. The total picture suggests these low limitations are out of step with judicial decisions and put district funds and property in jeopardy. (JBM)

* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *

ED243227

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

☒ This document has been reproduced as
received from the person or organization
originating it.

☐ Minor changes have been made to improve
reproduction quality.

• Points of view or opinions stated in this docu-
ment do not necessarily represent official NIE
position or policy.

"PERMISSION TO REPRODUCE THIS
MATERIAL HAS BEEN GRANTED BY

*Robert C.
O'Reilly*

TO THE EDUCATIONAL RESOURCES
INFORMATION CENTER (ERIC)."

Aspects of Liability in the
Operation of Schools

by

Robert C. O'Reilly

Professor of Educational Administration

University of Nebraska at Omaha

and

Secretary of the Board of Education

Ralston, Nebraska Public Schools

Presented at

The National Association of School
Boards Convention

Houston, Texas

March 31, 1984

EA 016 723

Introduction

There are injuries that come to persons which are purely accidental. That is, no other person was at fault, no other person caused or contributed to the injury. If one person causes injury to another through intention or negligence, that person may be pursued in court by the injured party, seeking damages. Technically, a tort is a civil wrong, an injury resulting from another person's disregard for duties that are imposed upon all citizens, considering the welfare of society. Torts are not crimes, although criminal acts may be a part of a whole situation from which a tort might arise.

For public school districts, where minor children are compelled to attend and are placed in the care of professional adults, there is an expectation that the adults will accept protection from harm as one duty. This is an ethical minimum and it involves skills that are largely intellectual as one person--the teacher--comes into contact with another--the pupil. The teacher's contract is only peripherally involved; this is an expectation long grounded in common law. It demands reasonable and proper behavior as a member of society. Those citizens who do less, who act carelessly, may be found liable in damages for injury. The child-adult relationship is one in which care and safety are prime considerations, and it has a "natural" application in school settings. It has been formalized through statements of ethics for teachers and through defining legislation.

Although the perspective of the 1980s indicates a "natural" application of tort liability to American public school districts, the reality has not been that smooth. To some extent, the common law concept of [in loco parentis] has protected teachers and school administrators from suit for

injuries to pupils. Another concept, also from common law, intervened. The doctrine of sovereign immunity originated in common law and was judicially applied a couple of centuries ago. It survived through the first half of the twentieth century on two major premises: (1) state instrumentalities, representative of sovereignty, were immune from suit; (2) the treasuries of state instrumentalities, developed by taxes levied for a particular purpose, could not be spent to satisfy another purpose--for example, an award of damages. In the latter half of the twentieth century, other considerations have come to the fore, and the public school districts, representing one kind of state instrumentality, have been successfully sued for damages in tort. The school's employees, officers, and elected boards have also been sued for money damages, successfully. The rights of schoolchildren are in the ascendency, partly because their attendance is compelled.

This paper is not a discussion of the historical aspects of school district immunity from suits. Neither does it attend the fine points of such impinging and related circumstances as the divisions between governmental and proprietary services of school districts and the consequences of state legislatures as they waived the immunity to suit of school districts. Rather, it is focused upon current experiences in awards for damages against school districts which should serve as some indicator of the kind of liabilities for which those school districts should prepare, and the service level of the insurance industry to the schools. Litigation and several selected court cases provide a basis from which to draw some inferences about negligence, liability, damages awarded, and the need for liability insurance to cover injuries---most of which are physical injuries.

Cases

It was in 1959 that the Illinois Supreme Court spoke in Molitar v.

Kaneland 18 IL 2d 11 (1959), set aside sovereign immunity, and specified that public school districts should assume their appropriate civil responsibility. The ruling was for Thomas Molitar, a student injured in a school bus accident. In 1983, the Ohio Supreme Court, in Carlone v. Overfield 451 NE 2d 1229, removed the protective cloak of governmental immunity from Ohio school boards, specifying that such boards were now liable for their own tortious acts, and for such acts by their employees. In between, many states acted through their legislatures to set aside--in whole or in part--the immunity of political subdivisions to suits. Although not constant, the prevailing general rule is that now, in the 1980s, school districts are liable for the negligence of their officers and employees.

Two cases from the 1970s are instructive of a trend, and even though one involves a private school, the amounts of the awards deserve attention.

In Sheehan v. St. Peter's Catholic School 188 NW 2d 868 (1971), Margaret Sheehan suffered the loss of an eye when struck by a rock that had been thrown by another student. The injury occurred while Margaret was a spectator at an eighth grade boys' baseball game, and during a time when the girls' teacher had gone back into the school. A jury awarded \$50,000 damages and the Minnesota Supreme Court affirmed that award for the May 6, 1966 injury. No contributory negligence could be found, and schools do have a duty of ordinary care.

In Brahatcek v. Millard School District 273 NW 2d 680 (1979), David Brahatcek was fourteen years old and in a ninth grade physical education class of the Millard Schools. The school included instruction in golf as mandatory and under the direction of the principal, a manual of instruction was written and approved. It was quite specific and stressed safety. Unknown to the principal, the PE teachers decided to vary the placement of the mats from which students would take practice swings.

On the day of the accident, one PE instructor was away on the occasion of his wife's giving birth to a baby. Taking his place was a student teacher who had been at the school for five weeks, who had assisted with golf classes for two days, and who was unaware of the safety precautions in the teacher's manual.

Standing too near for a demonstration, David was hit in the head by another student as he swung the club into a follow through stroke. The award of \$50,000 general damages, \$3,570.06 special damages, and costs, was upheld by the Nebraska Supreme Court, with the statements that there was no contributory negligence, and neither were the damages awarded excessive or exorbitant.

A major concern in planning for sound fiscal operations is the amount granted in settlement of suits for damages. Amounts of awards against political subdivisions are increasing. For example, a 1983 court award against the city of Omaha was for \$5,000,000 when a citizen, driving his car on a city street during a storm, was permanently injured by a large falling tree limb that struck his car. Omaha carried no liability insurance. A case that gained national attention originated in South Tucson. That city carried \$100,000 liability insurance. Faced with a much higher court award, the city took bankruptcy to avoid the obligation of payment. After much negotiating, in February 1984, the city agreed to pay a \$3,000,000 settlement to a police officer from another city, shot by mistake by a South Tucson officer.

Negligence by a principal and teacher resulted in damages of \$1,013,639 for Steven Larson. In Larson v. School District #314, 289 NW 2d 112 (1979), the Minnesota Supreme Court noted deficient supervision of a new teacher by the principal and attributed the cause of the injury to his negligence. In Peterson v. Multnomough Schools, 668 P. 2d 385 (1983), the Oregon Court of Appeals decided that an injured high school football player was entitled to

damages of \$1,020,000. The player was injured as a result of tackling another player, and tackled by making the forceful contact with his helmet. Suffering a neck injury, he was a quadraplegic. The injury occurred in a pre-season practice scrimmage and the court noted deficiencies in safety information provided by the coaching staff, and that the practice routines were violative of safety recommendations set forward by the national high school activities association.

Although amounts of damage awards seem to be increasing, there is some difficulty in stating this as a positive finding because so many suits never become part of the public record. That is, amounts of settlements are known only in a very narrow sense because many cases only establish the fact of negligence--or its absence--and a majority of the liability suits end in out-of-court settlements. One major insurance underwriter, in an interview with this author, estimated that 80 per cent of the suits are settled out-of-court. All of that privacy contributes to the situation of not knowing, to the condition of inexperience.

In Monfils v. City of Sterling Heights and Warren School District 269 NW 2d 588 (1978), the court declared that there are common sense restrictions that must be applied to governmental immunity, even in states that have not abrogated by statute that protection. School playgrounds are not precisely equivalent to school buildings. Nonetheless, Monfils was allowed to pursue his suit for damages (his son's loss of sight in one eye) by this Michigan Supreme Court reversal and remand.

In Vann v. Philadelphia Schools, 464 A. 2d 684 (1983), the Pennsylvania Commonwealth Court ruled against the plaintiff on the basis that her injuries were the result of a criminal act occurring off of school premises. She was assaulted and beaten but it was ruled an unforeseeable act.

In Kingsley v. Hill City Schools 251 NW 2d 634 (1977), LaVonne Kingsley, a seventeen year old junior in the high school, was injured when she climbed up on the lockers to get her coat which had been thrown there by other students. On other occasions she and her mother had complained to the principal about students throwing her coat on the lockers. The principal took no new supervisory action. On this occasion she retrieved the coat and jumped down, but her class ring was caught on a metal protrusion on top of the locker and that finger was denuded.

She was not negligent. The school has a duty of care. Supervision of students and of equipment was inadequate. She is entitled to an appropriate damage award.

In Cobb v. Fox 317 NW 2d 583, Scott Seelhoff was the second grade son of the plaintiff who was killed in an auto-pedestrian accident, hit by a car driven by Fox. Shortly before, he had gotten off a school bus owned and operated by the Fowler School District and was walking the remaining few blocks to his house. Operating school buses is a governmental function, but in this case the accident occurred after the boy got off the bus. It had proceeded on its route and he and his brother proceeded to walk toward their house, which was on the other side of the street. No connection between the school, its buses and bus routes, to the pedestrian death of the child was found.

Finally, it is once again possible to come to grips with the size of claims by looking at Fiske v. MacGregor, Div. of Brunswick, 464 A. 2d 719 (1983). Kelly Fiske was injured while tackling in a 1974 interscholastic football game. This suit was filed in 1975 against the helmet manufacturer on strict liability and breach of implied warranty. (The school district was not a defendant). Damages suffered were found to be \$3,500,000. The

jury found the plaintiff to be 40 per cent contributory, and an award of \$2,100,000 was made by the trial court. Both parties appealed and the Rhode Island Supreme Court affirmed the action of the lower court.

These cases, which are reasonably representative, reveal that in little more than a decade there has occurred a tendency to sue for higher damage awards, and that in many instances those higher awards have been sustained. The awards have been made against boards of education, employees of school districts, and against equipment manufacturers. However, most awards have been from suits against school districts and their governing boards.

Statutory Liability

States that have set aside sovereign immunity, have done that most frequently through statutes. A brief excerpt from the Oregon statute, Tort Action Against Public Bodies, provides some insights.

"Public body" means the state and any department, agency, board, or commission of the state, any city, county, school district, or other political subdivision or municipal or public corporation and any instrumentality thereof. ORS 30.260(2)

Oregon put limits on liability, also by statute.

Liability of any public body or its officers, employees or agents acting within the scope of their employment or duties on claims within the scope of ORS 30.260 to 30.300 shall not exceed:

- (a) \$50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.
- (b) \$100,000 to any claimant for all other claims arising out of a single accident or occurrence.
- (c) \$300,000 for any number of claims arising out of a single accident or occurrence.

No award for damages on any such claim shall include punitive damages... ORS 30.270(1) and (2)

The statutory limits set in the 1967 legislative action appears to be out-of-phase with damage awards of the 1980s, and could generate problems for school districts that operate on the premise that no court will allow a higher

settlement. For example, the 1983 damages assessed against the Multnomah Schools in Oregon (above) exceeded one million dollars, a figure well above Oregon's statutory limits. The judiciary and the legislative are not in harmony on this issue, but the judiciary gets the last word.

The Nebraska statute was passed in 1969, and the legislature set aside governmental immunity in that state when it enacted the Political Subdivisions Tort Claims Act. Similar generally, the Nebraska legislation was a more open law than was enacted in Oregon.

Except as otherwise provided in this act, in all suits brought under this act, the political subdivision shall be liable in the same manner, and to the same extent as a private individual under like circumstances, except that no writ of execution shall issue against a political subdivision. Disposition of or offer to settle any claim made under this act shall not be competent evidence of liability of the political subdivision or any employee or amount of damages.
NRS 23-2407

The statute has no specific dollar limits. That is one realistic difference from the Oregon statute. Nebraska attended a time limit on claims, the appropriateness of spending public funds for liability insurance, and recovery against negligent employees. As shown in these two statutory examples, a majority of states have set aside their sovereign immunity, following the lead so forcefully pronounced in Molitar v. Kaneland.

In the 1980s, public school boards in every state should provide protection for that board itself, and for the district treasury. A liability policy should cover board members and officers against allegations of negligence and against wrongful acts or omissions while performing the duties charged in their official capacities. The policies could be limited, scheduled, or broad in coverage. Obviously, there are direct relationships between premiums charged and extent of coverage, which creates one variable in pricing the policy. Among other variables are deductibles, self insurance, experience, risk characteristics, and size of the school population.

Surveys

The Insurance Information Institute carries out a constant surveillance for news of liability, negligence and damages that are reported in the press. Schools are included. On request, the Institute supplied an extensive folio of newspaper clippings. Taken from all over the nation, those clippings were examined and several items relating to public schools were selected as suitable for use, here. In 1982 in the Oklahoma City School District, a boiler exploded in the Star Elementary School. A teacher and five pupils were killed. An additional thirty persons were injured. Oklahoma law has liability damages ceilings identical to Oregon (\$50,000/300,000), but the school district also had liability insurance on boiler explosions up to a ceiling of \$3,300,000.¹ Those claims will not be settled for several years, but it is predictable that the insurance coverage may not be sufficient.

Again in 1982, a substantial court award was made against the Seattle Public Schools. Stemming from an accident that happened in 1977 and after five years of litigation, a \$6.4 million award was made to a former high school football player who was paralyzed. The award rested on a charge of negligence and exceeded the school district's liability policies by over \$900,000, which caused the district to take almost \$1,000,000 from its operating budget. Attorneys had engaged in out-of-court negotiations but they differed in reporting amounts that had been discussed and they did not arrive at a settlement. None of those amounts had been nearly so high as that decided upon by the jury, which had also decided that the player, Christopher Thompson, was 2 per cent contributory. Other aspects of the Seattle case are instructive, especially in the identification of defendants. The state interscholastic activities association was dismissed, but out-of-court settlements were made early by Riddell, Inc., the equipment manufacturer--\$95,000; and by the Renton

School District which sponsored the opposing football team--\$27,000.² The size of the 1982 award, and the scope of the defendants, are indicators of what any public school district should prepare for, as an ordinary administrative task.

The insurance industry has reacted to such high awards. Even in the 1970s, high awards were beginning to be decided against school districts, especially on the east coast. Personal liability claims coupled with sympathy decisions have created a new liability experience base. Insurance companies have responded with cancellations and with premium increases that, in some instances, have exceeded 1,000 per cent, as some moderate size school districts saw annual liability premiums go from less than \$5,000 to more than \$60,000.³ Another trend has been to increase deductibles and amounts of self insurance--all of which are added costs to the operation of the schools.

The Risk Line reported in December 1983 that the tendency toward large awards was accelerating and that some companies were finding themselves with inadequate reserves. The result has been increasing insurance company rehabilitation, insolvency, and liquidation. From January 1982 to December 1983, there were forty-five jury verdicts in New York state for \$1 million dollars or more to satisfy liability litigation against public bodies. New York was outpacing all other states in both number and amounts of such verdicts; however, Texas was not far behind in the million-or-more category, and included one award for \$11,360,000. The midwest, generally seen as quite conservative in such matters, may be changing, if Iowa is any indicator. A total of six million-or-more verdicts in that state have been reported and the personal injury verdicts for plaintiffs have increased 19 per cent above the national norms.⁴

In order to clarify the picture of purchasing liability insurance, and of claims and settlements, a questionnaire was distributed to thirty-two

selected school business managers in the State of Nebraska. The roster of administrators was selected from Nebraska memberships in the Association of School Business Officials. Twenty-seven questionnaires were returned, for a response rate of 84 per cent. Table I indicates the insured liability range of responding school districts, and it shows a strong inclination toward insuring for amounts on the low side of the ranges suggested in the questionnaire.

Table I
School District Liability Limits

<u>Range</u>	<u>Number</u>	<u>Per Cent</u>
Less than \$5 million	12	44.4
\$5-8 million	9	33.4
\$8-10 million	0	0
More than \$10 million	5	18.5
No response (1)		

The respondents were invited to indicate the number of liability claims lodged against their district, by years. For the responding group there were twenty-nine claims in 1981, twenty-four claims in 1982, and twenty-two claims in 1983; i.e., a total of seventy-five claims. Nebraska is a state with a wide range of school district size, with an absence of mid-size schools and a very sharp increase from the many smaller to the two larger districts. Of the seventy-five total claims, thirty-five were initiated in the Omaha Public Schools; another seven occurred in the Lincoln Public Schools. Those two larger districts accounted for 56 per cent of the liability claims in this reporting group, and by estimate, would account for approximately 55 per cent of the student body in the twenty-seven responding schools.

Part of this statewide research effort was an attempt to reveal relationships between claims experience and the insurance rates charged or the

availability of insurance underwriters. That is, it was presumed that if the claims experience was adverse to the insurers, requests from schools for it would not be well received. The attempts to secure claims experience data were only marginally successful. There were several reasons why this occurred. Some court cases were still pending, so final information was unavailable. Court records are public, so those liability settlements, when finally made, are automatically a part of the known claims experience. There is no known effort in this state to collect and publicize those data to public school districts, so the fact of their accessibility is not of particular importance; i.e., that aspect of claims experiences still remains, largely, an unknown.

When coupled to the strong tendency for out-of-court settlements, it is clear that the public school districts lack a basis from which to judge the appropriateness of insurance premium costs. The replies to questions devoted to information about out-of-court settlements indicated that there is a low level of interest among the schools to collect information about out-of-court settlements. There was some uncertainty in several of the responding districts about whether settlements were actually court determined or agreed upon through out-of-court settlements. As often as not, the concerned districts were unaware of the amounts of the settlements, having delegated all of that work to the insurer. All factors taken together indicate that in this state, schools seek liability coverage while they are lacking an experience base from which to judge the appropriateness of the prices set by companies selling the insurance.

This operational attitude may be a result of the magnitude of liability awards. Those reported for 1981, 1982, and 1983 ranged from \$2,000-\$60,000. By any measure, those are not large settlements. Several larger settlements are known by this author to have been made in Nebraska schools, but they were

either not in the respondent group or outside of the three year reporting time, 1981-83. The picture is clear. Liability insurance for Nebraska Schools should be cheap.

The respondents were asked to comment about the availability of liability insurance. The data indicated that it should not only be cheap, but should also be very available in a highly competitive situation. Only 62.9 per cent found it so. The remainder found liability insurance to be unavailable at a satisfactory level, found that competition was not keen, and found that sellers were scarce.

Examining the returned questionnaires revealed that the differences in experience in competitiveness to sell to school districts had no relationship to geography. That is, school districts with shared boundaries had opposite experiences. There was no relationship in the time that the coverage was secured. That is, among these professional school business managers, some secured liability insurance in any one of the three year span, and found the insurance industry very ready to sell policies. Those who found it difficult to secure insurance also covered the three year span when they let the specifications for their school.

Conclusion

It is beyond the scope of this paper to analyze the specifications developed by schools as they sought bids, or to determine if they should have used the prequalification of brokers as an alternative technique; however, for liability insurance, substantial ambiguity exists in the perceived ability/willingness of the insurance industry to provide liability insurance to Nebraska school districts. That is in harmony with information from other states as revealed in this paper. There was certainly no relationship between willingness

to sell and number of claims, or between willingness to sell and dollars of settlements--when none of the recorded settlements were large. Inquiring conversations with insurance underwriters cast no light on these uncertainties, leading to the conclusion that partially, the condition can be explained as an uninformed aspect of school operation with neither party--insurers nor schools--having an accurate and keen awareness of what would be appropriate coverage and what would be fair premiums. That, too, is a condition that extends nationally, and will continue to carry the burden of uncertainty as long as large damage awards for torts are a part of the school scene, and as long as settlements are generally held as private information.

The size of personal injury damage awards is increasing. Still, they occur as relatively isolated incidents in the total operation of schools. Five years is not an unusual lapse of time for the final disposition of claims against schools, which means that many of the injuries of the early 1980s will not be settled until about 1990. This lag time may be a deceptive factor as schools plan for what they consider to be adequate liability coverage. The total picture indicates a tendency for schools to carry insurance which has limitations that are far too low, out-of-step with judicial decisions, and putting the district funds and property in jeopardy. Some sort of catastrophe liability--multi-million dollar coverage for a single injury--may be needed for appropriate protection as public schools move through the latter years of the twentieth century. It is an aspect of school operation that must have closer attention.

REFERENCES

- ¹Business Insurance, January 25, 1982, p. 1
- ²Business Insurance, February 22, 1982, p. 2
- ³New York Times, November 20, 1977
- ⁴Risk Line, December, 1983, p. 2

CASES

- Brahatcek, v. Millard School District, 273 N.W. 2d 680 (1979)
- Carlone v. Overfield, 451 N.E. 2d 1229 (1983)
- Cobb v. Fox, 317 N.W. 2d 583 (198)
- Fiske v. MacGregor, Div. of Brunswick, 464 A. 2d 719 (1983)
- Kingsley v. Hill City Schools, 251 N.W. 2d 634 (1977)
- Larson v. School District #317, 289 N.W. 2d 112 (1979)
- Molitar v. Kaneland, 18 IL. 2d 11 (1959)
- Monfils v. City of Sterling Heights and Warren School District, 269 N.W. 2d 588 (1978)
- Peterson v. Multnomough Schools, 668 P. 2d 385 (1983)
- Sheehan v. St. Peter's Catholic School, 188 N.W. 2d 868 (1971)
- Vann v. Philadelphia Schools, 454 A. 2d 684 (1983)